Supreme Court of the United States.

No. 288.

EUGENE S. EUNSON, and
JACOB LAGOWITZ,
Plaintiffs in Error,

vs.

NORMAN W. DODGE,
T. BENJAMIN MEIGS, and
WILLIAM E. DODGE.

In Error to the Circuit Court of the United States for the Southern District of New York.

BRIEF FOR DEFENDANTS IN ERROR.

S. D. LAW,
Counsel for Defendants.

NEW YORK:
JOHN POLHEMUS, PRINTER, 102 Nassau Street.
1873.

Supreme Court of the United States.

EUGENE S. EUNSON and JACOB LAGOWITZ, *vs.* NORMAN W. DODGE, T. BENJAMIN MEIGS and WILLIAM E. DODGE.	IN EQUITY. *Appeal from the Circuit Court for the Southern District of New York.*

BRIEF FOR THE APPELLEES.

This is a bill in Equity, brought by the complainants, as owners by assignment, of certain Letters Patent of the United States for "An improved machine for sawing thin boards, &c.," granted to John Myers and Robert E. Eunson, May 23, 1854, and extended for seven years from the 23d day of May, 1868, to restrain the defendants from using, during such extended term, a machine for sawing thin boards, which they had in use during the original term of said patent, and were using at the time of such extension.

The original Letters Patent, granted to John Myers and Robert E. Eunson would have expired May 23, 1868, but were extended to said patentees on the 13th day of May, 1868, for the term of seven years from May 23d, 1868. On the 20th day of May, 1868, one of the patentees, Robert E. Eunson, sold and assigned all his right in said patent and extension to the complainant Eugene S. Eunson; and on the 19th day of June, 1868, the other patentee, John Myers sold and assigned to the complainant, Jacob Lagowitz all his, said Myers', interest in such patent and extension, within and for the State of New Jersey. (Bill of Complaint, Record, p. 2.)

It is upon such Letters Patent, so extended, that this suit is brought by the complainants, as the assignees thereof, and who hold the title thereto in and for the State of New Jersey, against the defendants, who are doing business in Jersey City, in the County of Hudson, in said State.

No question is raised in this suit, either as to the validity of the complainants' patent or their title thereto, or as to the machine in use by the defendants containing the invention described and patented in complainants' patent.

The only question in this case is as to the right of the defendants to use, and to continue to use, during the extended term of the patent, such machine.

This question is one purely of law and for the Court to pass upon.

The facts in the case are fully set forth in the bill and answer, and the issue clearly raised therein; but the

STATEMENT OF FACTS,

as agreed to by the parties to the suit (Record, pp. 12-13), in connection with the Exhibits thereto attached, embody and set forth, very concisely, all the material facts in the case; and upon the facts as therein set forth the parties come to this Court for an enunciation of the law governing the rights of the parties in the suit.

Such agreed Statement of Facts is as follows:

"We, the solicitors for the respective parties to this suit, do hereby agree that the following state of facts is proved by the pleadings and proofs in this cause.

Dated Nov. 21st, 1871.

MATTHEWS & BETTS,
Complt's Sol'rs.

S. D. LAW,
Deft's Sol'r."

STATEMENT OF FACTS.

"The complainants are the owners, within and for the State of New Jersey, of Letters Patent of the United States, granted to John Meyers and Robert G. Eunson, May 23d, 1854, for an improved machine for sawing thin boards, &c., No. 10,965, and extended for seven years, from May 23d, 1868, a copy of which patent is annexed, marked Exhibit A."

"The defendants are copartners under the name of Dodge & Meigs, doing business as lumber merchants in Jersey City, Hudson County, N. J. (Norman W. Dodge and T. Benjamin Meigs, being general partners, and William E. Dodge special partner) under the laws of the State of New York, and are the successors in interest as to all said business carried on at Jersey City of the firm of Dodge & Co., originally composed of Anson G. P. Dodge, Charles Hebberd and T. Benjamin Meigs, and to which firm Dexter B. Chambers and Norman W. Dodge were afterwards admitted as partners."

"In May, 1865, the Huntington Machine Works of Newark, Essex County, New Jersey, built and sold, without right or license under said patent, to Anson G. P. Dodge, T. Benjamin Meigs and Charles Hebbard, then composing the firm of Dodge & Co., a re-sawing machine, containing and employing substantially the inventions or devices described and claimed in the 1st, 2d and 4th claims of said Letters Patent."

"The said Dodge, Meigs & Hebbard used said machine in their business, in good faith, without knowledge of said patent, for some fifteen months, when they were notified by one M. F. Shureman, who was an assignee, for the County of Hudson, State of New Jersey, that said machine was claimed to be an infringement of said patent; and to remove all doubt as to their right to run and use said machine, said Dodge & Co. purchased of said Shureman, on the 22d day of September, 1866, the said Letters Patent, and all right and interest therein within and for the said County of Hudson, State of New Jersey.

"The chain of title of the defendants is contained in, and shown by the Exhibits B, C, D."

"Said Dodge, Meigs and Hebbard continued to use said machine in their business, at Jersey City, within the said County of Hudson, State of New Jersey, during the unexpired original term of said patent, and until the expiration thereof, and had the same in use at the time of the expiration of such original term of said patent; and the defendants, as successors of said Dodge, Meigs & Hebbard, have continued to use said machine during the extended term of said patent, in the same place, and in the same manner as such machine was used during the original term of said patent, and at the time of the expiration thereof."

The principal facts stated more briefly are as follows:

The original patent of Myers & Eunson expired May 23, 1868, but was, before its expiration, duly extended, and the complainants are the owners of such extended term within and for the State of New Jersey.

The defendants in May, 1865, purchased a re-sawing machine which contained the invention covered by complainant's patent; they used such machine without knowledge that it infringed any patent, for about fifteen months, when an assignee of such patent, for the county of Hudson, New Jersey, (where the machine was being used) appeared and made claim that such machine was an infringement of such patent and of his rights thereunder. The defendants in September, 1866, bought of such assignee the said patent, and all the right and interest therein for the unexpired term thereof, within and for the said County of Hudson, and received an assignment thereof, and the defendants, after such assignment, continued the use of such machine during the rest of the original term, and had it in use at the time of the expiration of the original patent, and have continued its use ever since, while the extended term has been running.

The complainants allege that the use of such machine by defendants, since the extension of said patent, is an infringement of their rights under such extended patent.

The defendants, on the contrary, insist that such use by them of such machine, is not an infringement of such extended patent, and that they have full and legal right to continue its use.

The Court below decided that the defendants had the right to use such machine during the extended term of the patent, and dismissed the bill of complaint.

A decree was entered in the Court below in accordance with such decision (Record pp. 20, 21), and

From such decree an appeal has been taken by the complainants to this Court.

The question before this Court is, whether, on the facts stated, and agreed upon by the parties, the defendants have the right to use and to continue to use during the extended term of the patent, the machine which they had purchased in 1865, and which was in use by them at the time of the expiration of the original patent, and of the granting of the extension thereof.

It is submitted that the defendants have such right, and may legally continue such use, on either of the following grounds:

1*st*. *Under the express provisions of the Patent Acts, as defined and construed by the Federal Courts, conferring rights upon assignees and grantees of patents, in the extension thereof.*

2*d*. *Under the well settled rules of law as to the right of a purchaser or owner of a patented machine to use the same.*

1*st*. *The right of defendants to use a machine, during an extended term, under a state of facts such as are agreed upon, is secured by the express provisions of the Patent Acts, as interpreted and construed by the Federal Courts.*

The term of the original patent, it is to be remembered, would have expired May 23d, 1868, and was extended for seven years from that date.

The law in force at that time, as to the rights of assignees, and grantees, under the original patent, in an extended term, is found in the Act of July 4th, 1836, Section 18 of which has the following provision:

> "And the benefit of such renewal (or extension) shall extend to assignees and grantees of the right to use the thing patented, to the extent of their interest therein."

This provision has frequently been before this Court, and the inferior Federal Courts, and its meaning has been fully settled, so far at least as patents for *machines* are concerned: though the extent of its application, in the case of a patent for a *process*, has not yet been authoritatively determined.

The leading case, as to the construction of this provision of the law, is that of

WILSON *vs.* ROSSEAU, 1845.
4 *Howard*, 646,

which came before this Court, on a certificate of division of opinion by the Judges of the Circuit Court of the United States for the Southern District of New York.

One question certified was, whether, by force and operation of the 18th section, referred to, the extension of a patent enured to the benefit of assignees under the original patent, or enured to the benefit of the patentee, or his administrator only.

The opinion of the Court was declared by Mr. Justice Nelson, long, and until but lately an Associate Justice of

this Court, and than whom no one was more learned in Patent Laws, or better qualified to judge of the true meaning and the proper interpretation of the Statutes respecting Patents.

This Court held, in that case, that the clause in the said 18th section had no reference to the general right of assignees and grantees; and that the benefit or reservation in such clause, as to assignees, and grantees who were placed on the same footing, was limited to *the right to use* the thing patented, excluding any right to *make and vend*, and that such clause

> "Pointed to those who might be in the use of the patented article, at the time of the renewal and was intended to restore, or save to them such *right to use*, and which, without that clause, would have been vested by the renewal exclusively in the patentee,"

and that the phrase, to the extent of their interests therein "meant" their interest in the patented machines at the time of the extension, whether in one or more.

The same question was also certified to this Court, at the same term, in

SIMPSOM *et al. vs.* WILSON, 1845.
4 *Howard*, 709,

from the Circuit Court for the district of Louisiana, and a like opinion rendered therein.

This last case came again subsequently before this Court, WILSON *vs.* SIMPSON *et al.*, (1849,) 9 *Howard*, 109, when it was again held by this Court, Mr. Justice Wayne delivering the opinion of the Court, that

> "The renewal of a patent did not enure to assignees and grantees to the extent they were interested in it before the renewal and extension, but that the law saved to persons in the use of machines at the time the extension took effect the right to continue their use," p. 124. And also that such

right permitted the replacing of such portions of such machines, as should be, from time to time worn out by use," pp. 125, 126.

The construction of this clause of the 18th section of the Act of 1836, came again before this Court in

BLOOMER *vs.* MCQUEWAN, 1852.
14 *Howard*, 539.

the question in that case being, whether the right to use machines, which were being used at the time of the granting of a first extension, terminated with such extension, or continued under a further extension granted by virtue of a special Act of Congress.

TANEY, *C. J.*, gave the opinion of the Court, holding that the defendants having been in the lawful use and ownership of the patented machine at the time of the expiration of the extended letters patent, could lawfully continue the use of such machine, during a further term of such patent extended by Act of Congress.—(*Ibid*, 550, 551.)

The question whether a licensee, or his assigns, under the original term of a patent, had the right to continue to use, during an extended term, the machinery or invention in use by him at the time of the extension of the patent, came again before this Court in

CHAFFEE *vs.* BOSTON BELTING CO., 1859.
22 *Howard*, 217.

The case went off on another point—the failure of the defendants to show a connected chain of title in themselves to the machinery in question;

But the Court, Clifford, *J.*, used the following language:

"Under the provision of the 18th section of the Act of 1836, it has repeatedly been held by this

Court, that a party who had purchased a patented machine, and was using it during the original term for which the patent was granted, might continue to use the machine during the extended term"—*Ibid* 223: citing *Bloomer* vs. *McQuewan*, 14 Howard 549; and *Wilson* vs. *Rosseau*, 4 How., 646.

And the Court add: "Hence it is obvious, that if a person *legally acquires a title* to that which is the subject of Letters Patent, he may continue to use it until it is worn out, or he may repair it, or improve upon it, as he pleases, in the same manner as if dealing with property of any other kind."—*Ibid*, 223.

The patent in this case was for a *Process*, but the point how the reservation in said 18th section affected a patent for a Process, was not raised or decided.

The question as to the right of an assignee, or his assigns, who had obtained the right to make and use, and sell patented machines under one term of a patent, to continue to use, under an extended term, machines in use at the expiration of the first term, came again before this Court, in another and a different phase from which it had ever before been presented, in

BLOOMER *vs.* MILLINGER, 1863.
1 *Wall.*, 340.

In this case the right to make, use and sell was granted under a first extension, allowed by the Commissioner of Patents, or Board of Commissioners, and such right was limited in terms "during the *said* extension;" and by a subsequent assignment, declaratory of the rights intended to be conveyed by such original grant, such right was in words declared to be "*for the term of time for which the patent was extended by the Board of Commissioners; being for the term of seven years*, AND NO LONGER, *from and after the expiration of the original term of fourteen years.* The defendant purchased his machine from such grantee.

Subsequent to such grant, given under such first extension, the patent was extended by Act of Congress for *seven years from the expiration of the extension granted by the Commissioner.*

The question was, whether under the grant made under the first extension, and in such strict terms limited to the term of such extension, the grantee, or his assigns, could use his machines after the expiration of that term and during the new term for which the extension had been granted by Congress.

It was held by the Court, Mr. Justice Clifford delivering the opinion of the Court, in this case also,

> "That the owner of the machine, whether he built it or purchased it, if he has also acquired the right to use and operate it during the lifetime of the patent, may continue to use it until it is worn out, in spite of any and every extension subsequently obtained by the patentee or his assigns." (*Ibid*, 350.)

The cases of *Bloomer* vs. *McQuewan*, 14 How., 549, and of *Chaffee* vs. *Boston Belting Co.*, 22 How., 223 were commented on and approved.

The principle established by these cases has again been affirmed by this Court, at the present term (1872) in MITCHELL *vs.* HAWLEY.

These decisions of this Court have also been frequently followed by the different Circuit Courts.

WOODWARD *vs.* CURTIS, 1847.
2 *Wood & Min.*, 524.

Mr. Justice Woodbury, though differing in opinion from the majority of this Court, in *Wilson* vs. *Rosseau*, recognised the decision in that case to be the leading and controlling decision, and said,

> "The majority of the Court then held, that where a machine, or *a right to use a machine*, had been

sold before the original term expired, the use might be continued till the machines then in operation under the grant were worn out or destroyed." *Ibid*, 528.

"No distinction is taken between the acquisition of that right by purchasing a particular machine, or by purchasing the right to use a machine while the term lasted, and under this creating one, which continued to be in use when the original term expired." *Ibid*, 529.

GIBSON *vs.* GIFFORD—1856.
1 *Blatch.*, 529.

Mr. Justice Nelson said:

"The question, whether an assignee can continue in the use of a machine or machines lawfully constructed under a first or second term, in pursuance of an interest acquired under either, and in use at the termination of such term, we regard as conclusively settled by the case of *Wilson* vs. *Rosseau*, 4 How., 646."

DAY *vs.* UNION RUBBER CO., 1856.
3 *Blatchf.*, 491.

The question as to the right of a licensee, under an original patent, to continue the use of the thing patented under an extended term, came before the Circuit Court for the Northern District of New York, under a patent which was regarded by the Court to be both for a *machine* and for a *process*.

The Court held the same doctrine as laid down in Wilson *vs.* Rosseau, 4 How., and the other cases above cited, as to the right of a licensee, under an original patent, to continue the use of the thing patented under an extension.

In this case the Court also held that the same right existed under the Statute, in respect to a process, as to a machine. This portion of the decision has, however, been since questioned in *Wood* vs. *Mich., So. R. R.*, 3 Fisher, 470; and in *Wetherill* vs. *Passaic Zinc Co.* N. Jer., 1872; 2 Off. Gaz., 471.

HODGE *vs.* HUDSON RIVER R. R. Co., 1868.
6 *Blatchf.*, 85.

This was a suit under a patent for Car Brakes; the defendants justified their use, during the extended term, of the brake in use by them, under a license granted under the original term, "to construct and use the patented improvement on any and all cars belonging to such Company."

The Court, Blatchford, *J.*, held that such license was only for the original term, and then used the following language:

> "There being, then, in this case, no express stipulation carrying the license into the extended term, the only right which the Hudson River Railroad Company possessed under the extended term is that which is given by the clause of Section 18 of the Act of July 4, 1836, which provides that the benefit of an extension of a patent shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interest therein.
>
> "As the thing patented in the present case is a machine, the law is entirely settled that the only right which the company, as a lawful licensee under the patent for the first term of the right to use the thing patented acquires under the extended term, is the right to continue to use until they are worn out, or as long as they can be repaired, such brakes *as they had lawfully in use* under said license on October 2, 1863" (the date of the expiration of the original term).

The learned Judge citing as authorities the cases of *Wilson* vs. *Rosseau*, 4 How., 646; *Bloomer* vs. *McQuewan*, 14 How., 539; *Chaffee* vs. *Boston Belting Co.*, 22 How., 217, and *Bloomer* vs. *Millinger*, 1 Wall., 340.

WOOD *vs.* MICH. SO. AND NORTH IND. R. R. CO., 1868, 3 *Fisher*, 464.

The question of the right of an assignee or grantee, under an extended term, came before the Court under a state of facts almost precisely similar to the facts in the present case.

The defendant had been an assignee under the original term, having the right to *make*, *use*, though not to *sell* the patented improvement, under which assignment such defendant claimed the right of continuing to make for its own use, and of using the thing patented, during the extended term.

The Court, McDonald, *J.*, with whom Mr. Associate Justice Davis concurred, held that the defendant had no right, under their transfer, to make new brakes after the expiration of the original patent, but had the right to continue the use of such brakes as were in use at the time of the extension.

And referring to and recognizing the decisions made in the several cases before cited, viz.: *Wilson* vs. *Rosseau*, 4 How., 680; *Simpson* vs. *Wilson*, 4 How., 709; *Wilson* vs. *Simpson*, 9 How., 109; *Bloomer* vs. *McQuewan*, 14 How., 539; *Chaffee* vs. *Boston Belting Co.*, 22 How., 217, and *Bloomer* vs. *Millinger*, 1 Wall., 340, the Court used the following language:

> "The doctrine established in all these cases is, that an assignee of a patent holding, at the expiration of the first term, a right during that term to make and use the thing patented, may, during the term of its subsequent extension, continue to use it and even repair it for use; but he cannot make it for use or for any other purpose." (*Ibid.*, 469–70.)

The current of decisions in this Court, and in the inferior Federal Courts, which commenced its course soon after the passage of the Act of 1836, by which our patent system was placed on a firm basis, and form, and comeliness and vital harmony given to it, and which has con-

tinued to flow for more than a quarter of a century, ever increasing in power, but ever flowing in the same direction, and in harmonious accordance with the principles which were so clearly and wisely enunciated by this Court in 1845, have established beyond question or room for doubt, the doctrine that a person in the lawful use of a patented machine at the time of the expiration of the original term of a patent, or of the term under which such use became vested, can continue in the use of such machine, until it is worn out, and may repair it, as repairs are necessary.

And such right exists whether the party so using the patented article

Is a mere purchaser of a machine from the patentee or his assignee: or

Was a licensee under the original term and used the machine under such license: or

Was an assignee, having the triple rights, during the original term, to *make*, *use* and *sell* the patented article.

It is insisted, however, on the part of the appellants, that these decisions are not applicable or controlling in this case, as the machine in use by the defendants at the time of the expiration of the original term, was not originally made under the patent, or purchased either of the patentee or of any one having the right under him to make and sell such machine; and as the defendants, at the time they purchased and began to run such machine were not licensees under the patent, and acquired no right to use the machine.

And it is argued, that the machine being itself originally made, not under the patent, and the defendants having had no right, at the time they begun to run such a machine, to use it, they have no right under the Statute to continue its use during the extended term, but are excluded from the benefits of the Statute, although prior to the expiration of the original patent, they became the owners of the patent for the territory in which they were running their machine.

It is submitted however,

That the defendants, by, and as a necessary result of, their purchase of the patent for the territory in which they were running their machine, not only obtained the right, by virtue of such assignment, to make, sell or use the patented invention, or machines containing such invention, but that such assignment to them of the interest in the patent, removed, as to them, all disability growing out of the wrongful construction of the machine then being run by them, and rendered the use of such machine as legal, to all intents and purposes, as if it had been made by the patentee himself, and purchase of him by the defendants.

That the transfer to the defendants of said patent, within and for the territory in which they were running such machine, was made by the parties thereto for the purpose of removing all doubt as to the right of defendants to run and use such machine, and for that only.

Answer, *Record*, *p.* 10 (11).
Statement of Facts, *Record*, *p.* 13 (16).

And that such transfer cured all illegalities then existing, or supposed to exist, either in the machine or in the use thereof, and made both possession and use of such specific machine legal.

The right secured to assignees and grantees by the Act of Congress is general in its nature, though limited in extent.

The reservation is generally to assignees and grantees of the right to use the thing patented;

Not to assignees and grantees of any particular class, or who became such under particular conditions, but to all who possess the legal character of assignees and grantees; that is, *all* who have *the right to use the thing patented.*

And to all who have such right *at the time the extension or renewal is granted*, without any limitation or

condition as to how they obtained such right, or how long they may have held it.

Every person, therefore, who has the right to use the thing patented, at the time of the extension, is entitled to the benefit of the extension to the extent of his interest in the thing patented.

If the defendants were, to use the language of the Court in *Wilson* vs. *Rosseau*, "in the use of the thing patented at the time of the renewal;" and if they had, to adopt the language used in *Chaffee* vs. *Boston Belting Co.* "legally acquired a title to that which was the subject of the Letters Patent,"

Then the Statute "intended to save them that right" (4 How., 612), and they may continue to use "the thing patented until it is worn out." (22 How., 223.)

"And no distinction is taken between the acquisition of such right, by purchasing a particular machine, or by purchasing the right to use a machine while the term lasted." (2 Wood. & Min., 527.)

It is admitted by the agreed Statement of Facts (Record, p. 13), that the defendants, at the time of the extension of the patent, were assignees of the patent for the County of Hudson, New Jersey, and were at that time in the lawful use of the machine which they have since then been running.

Under such well-established decisions, the right of the defendants to continue the use during the extension, of the machine which they had in use at the expiration of the original patent, must be held as complete under Section 18th of the Act of 1836.

2d. The defendants are also entitled to be considered as lawful purchasers of a patent machine and, therefore, having the right to continue the use of such machine as long as it lasts.

The admitted facts show that the defendants purchased in the open market a machine for their own use;

that they used such machine openly for a considerable time, without molestation or knowledge that such machine was an infringement of any one's rights; that, subsequently, the patentee, or his assignee, notified the defendants that such machine was an infringement of the patent held by him, and that "to remove all doubt as to their right to run and use such machine" they purchased the patent for the County in which such machine was operated.

The defendants did not purchase the interest in the patent for the purpose of trafficing in it, or making and selling machines to others, and there is no evidence or pretense that they ever made a single machine (even for their own use); but they obtained such interest in the patent solely to enable them to run the machine they then had in use, and which they have continued in use ever since; they obtained such interest merely to place the machine they had bought of a third party on the same footing, with respect to the right to use the same, as if they had purchased it of the patentee or his assignee.

The assignment to the defendants legalized the possession and use of that machine, which before had been illegal: and the establishment of such legality of possession and of use, conferred upon such machine all the rights and incidents which could and would have attached thereto, had such legality of use and possession both been obtained at the same time when the original purchase of the machine was made.

And the owner of the patent, by thus legalizing the possession and use of such machine not merely removed all the liabilities under which such machine had previously been held, but also vested such machine with all the rights and incidents which could have attached thereto, had the machine been originally sold by the patentee himself, or by the person holding the legal title of the patent.

The true and legal force and effect of the assignment of the interest in the patent to the defendants is to be measured by what was *actually done* by them under such assignment, and not by what they might have done. It

is true, they had the right to *make and sell* the patented invention, but they did not; they only exercised their right *to use*, and exercised this right in connection with the machine they had; and this was all they wanted to do.

The sole effect of such assignment was thus to legalize, taking that word in its full meaning, the purchase of the machine held by defendants; or, in other words, put the defendants in the position of legal purchasers of such machine, with its accompanying rights.

It has been held by this Court, in *Bloomer* vs. *McQuewan*, 14 How., 539, 549, and in *Chaffee* vs. *Boston Belting Co.*, 22 How., 217, 223,

> That the purchaser of a patented implement or machine, for the purpose of using it in the ordinary pursuits of life, stands on a different ground, than the assignee of a portion of the franchise which the patent confers. Such a machine, so purchased, is not within the limits of the monopoly, and is not under the protection of the Patent Acts, but is private property to be used like any other private property; and the purchaser buys it for the purpose of using it as long as it is fit for use, and found to be profitable.

In the case of *Chaffee vs. Boston Belting Company*, the Court say:

> "Hence it is obvious, that if a person legally acquires a title to that which is the subject of Letters Patent, he may continue to use it until it is worn out, or he may repair it, or improve upon it, as he pleases, in the same manner as if dealing with property of any other kind."

The same doctrine is also laid down in *Goodyear* vs. *Beverly Rubber Co.*, 1 Cliff., 348, where the Court say:

From this rule (that a valid sale of a patented article makes it the private property of the purchaser),

> "From this rule, which is believed to be a sound one, it follows that if a purchaser acquires an abso-

lute, unconditional title to that which is the subject of a patent, he may continue to use it until it is worn out, or he may repair it, or improve upon it as he pleases, in the same manner as if dealing with any other private property. He may devise or sell it, or if it is composed of various parts, he may break it up, and use the materials for any other lawful purpose." *Ibid*, 356.

And the following cases are to the same effect:

Aiken vs. Manchester Print Works, 2 Cliff, 455.
Adams vs. Burke, Mass., 1871, 1 Off. Gaz. 282.
Hawley vs. Mitchell, Mass., 1871, 1 Off. Gaz. 306.
Wetherill vs. Passaic Zinc Co., N. J., 1872. 2 Off. Gaz. 471.
Webster's Patent Cases, 413, note p.

The authority of these several cases, applied to the facts in the present case, clearly establish the conclusions

That the defendants, under the 18th Section of the Patent Act of 1836, may lawfully continue to use, during the extended patent, the machine which they had in use at the time of the expiration of the original patent:

And also, that the defendants may lawfully continue the use of such machine, as purchasers from the patentee, or his legal assigns, of such machine, or the right to use the same.

The decree below should be affirmed.

S. D. LAW,
Counsel for Appellees.

18-417

Submitted Jan 28 Motion Denied

Jan 28 3

Justice Miller

Writ

SUPREME COURT OF THE UNITED STATES.

No. 10.—ORIGINAL.

EX PARTE: IN THE MATTER OF THE STATE INSURANCE COMPANY OF MISSOURI, PETITIONER.

PETITION FOR A WRIT OF MANDAMUS TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA, AT MOBILE.

FILED JANUARY 19, 1874.

Oct T 1873.

a To Mary C. Kolb, or her attorneys of record, Messrs. Samuel F. Rice and Eli S. Shorter:

Please take notice that on Friday, the 16th January, 1874, or as soon thereafter as the Supreme Court of the United States will hear the motion, the State Insurance Company of Missouri will move the court for a mandamus or other appropriate order to the honorable the circuit court of the United States for the southern district of Alabama, at Mobile, to require said honorable court to take jurisdiction of and hear and determine the cause removed to said court from the city court of Eufaula, Alabama, wherein Mary C. Kolb is plaintiff and The State Insurance Company of Missouri is defendant.

Said motion will be founded on the petition hereto attached, and is supported by the record of the proceedings had in said cause in said court, a transcript of which is hereto attached, certified by the clerk of said court, and especially upon the bill of exceptions therein contained.

JOHN T. MORGAN,
Attorney for Petitioner.

Rec'd in marshal's office, Jan. 3rd, 1873, and executed same day by serving a copy of the within notice on Samuel F. Rice.

R. W. HEALY,
U. S. Marshal,
By GEO. COLTIN, *Deputy.*

b To the honorable the judges of the Supreme Court of the United States:

The petition of the State Insurance Company of Missouri respectfully showeth to the court that, at the December term, 1873, of the circuit court of the United States for the district of Alabama, at Mobile, honorable William B. Woods, circuit judge, presiding, the proceedings were had which are set forth in the transcript of the record attached hereto, and made part of this petition, whereby said honorable court declined to exercise any jurisdiction in the case of Mary C. Kolb against your petitioner, and caused the same to be stricken from the docket, because said circuit court considered and adjudged that it had no jurisdiction thereof. Your petitioner prays that the said judgment be inquired of by this honorable court, and that a writ of mandamus issue to said circuit court of the United States, and that said court be required to take jurisdiction of said cause, and return the same to the docket, and to proceed therein according to law.

THE STATE INSURANCE CO. OF MISSOURI,
Per JNO. T. MORGAN,
Attorney for Petitioner.

1 In the circuit court of the United States for the district of Alabama, at Mobile, December term, 1873, Hon. Wm. B. Woods, presiding.

MARY C. KOLB
vs.
THE STATE INSURANCE COMPANY OF MISSOURI.

In this cause, on the 23d December, 1873, the counsel of the plaintiff moved the court to strike the cause from the docket, on the ground that this circuit court of the United States has no jurisdiction thereof, and

in support of the motion, introduced the following transcript of the record of the proceedings had in said cause in the city court of Eufaula, Alabama, which transcript was filed in this circuit court of the United States on the 3rd day of February, 1873, and is in the words and figures following:

2 *Affidavit to secure attachment.*

THE STATE OF ALABAMA,
Barbour County:

Before me, Henry Oppert, a justice of the peace in and for said State and county, personally came Mary C. Kolb, who, being duly sworn, deposeth and saith that the State Insurance Company of Missouri, a foreign corporation, chartered by the legislature of the State of Missouri, in accordance with and in pursuance of the constitution and laws of the said State of Missouri, is justly indebted to the said Mary C. Kolb, in the sum of eight thousand dollars, with legal interest thereon from the maturity of the policy of insurance hereinafter described, which said sum of eight thousand dollars and said interest thereon is now justly due, for the total destruction by fire of the brick, metal, and slate-roof building insured by said State Insurance Company of Missouri, on the 29th day of November, A. D. 1871, for the term of one year, com-
3 mencing at noon on said 29th day of November, A. D. 1871, (for the term of one year) and terminating at noon on the 29th day of November, A. D. 1872, as will appear by their policy of insurance, numbered 15, and issued by said foreign corporation to Mrs. M. C. Kolb, this affiant, for eight thousand dollars, & dated on the 29th day of November, A. D. 1871. That the said building was totally destroyed by fire in the city of Eufaula, in said county, where the same was situated, on the 29th day of January, A. D. 1872. That the said State Insurance Company of Missouri is a foreign or non-resident corporation residing outside of the State of Alabama, and having its legal existence and residence in the State of Missouri, where the said corporation was chartered as aforesaid, and that this attachment is not sued out for the purpose of vexing or harrassing said corporation defendant aforesaid.

(S'gn'd) MARY C. KOLB.

Sworn to and subscribed to before me this 3rd day of June, A. D. 1872.

(S'gn'd) HENRY OPPERT, *J. P.*

Affidavit of inability to make a bond.

4 THE STATE OF ALABAMA,
Barbour County:

Before me, a justice of the peace in and for said State and county, personally came Mary C. Kolb, who being duly sworn deposes and says, that, in the suit to be commenced this day by her and in her name by attachment against the State Insurance Company of the State of Missouri, a foreign corporation, for eight thousand dollars, besides interest, to be returnable to the next term of the city court of Eufaula, she is unable, by reason of her poverty to give the requisite bond required by section 2931 of the revised code of Alabama, of plaintiffs in attachment suits; and that affiant has diligently sought to give the bond

required by law to procure said attachment; and that affiant has been unable to do so.

(S'gn'd) MARY C. KOLB.

Sworn to and subscribed before me this 3rd day of June, A. D. 1872.

(S'gn'd) HENRY OPPERT, *J. P.*

5 THE STATE OF ALABAMA,
Barbour County:

To any sheriff of the State of Alabama, greeting:

Whereas Mary C. Kolb hath complained on oath to me, Henry Oppert, a justice of the peace in and for the State and county, that the State Insurance Company of Missouri, a foreign corporation, is justly indebted to her, the said Mary C. Kolb, in the sum of eight thousand dollars, besides interest; and the said Mary C. Kolb having made affidavit as required by law in such cases, and having made the further affidavit authorized and required by the act of the legislature of this State, approved Sept. 16th, 1868, of her inability to give the bond required of plaintiff in attachment suits, you are hereby commanded to attach so much of the estate of the said State Insurance Company of Missouri as will be of value sufficient to satisfy the said debt and costs ac-
6 cording to the complaint; and such estate, unless replevied, so to secure that the same may be liable to further proceedings to be had at the next term of the city court of Eufaula, to be held at Eufaula on the 2nd Monday of June, instant, when and where you must make known how you have executed this writ.

Witness my hand this the 3rd day of June, A. D. 1872.

(S'gn'd) H. OPPERT, *J. P.*

Sh'ff's 1st endorsement.

Received in office this June 4th, 1872.

(S'gn'd) J. C. FLOURNOY, *Sh'ff,*
Per T. D. PATTERSON, *Dep She'ff.*

2nd endorsement.

Executed by serving citation of garnishment on J. G. L. Martin and J. H. G. Martin, this the 4th day of June, A. D. 1872.

(S'gn'd) J'N C. FLOURNOY, *Sh'ff,*
By T. D. PATTERSON, *Dep'ty Sh'ff.*

3rd endorsement.

Executed by serving copies of this citation upon C. Rhodes, T. J. Perkins, M. M. Berrenger, Marburg & Lorch, John N. Webb, J. C. McKenzie, W. E. Besson, & W. H. Locke, this Nov. 28th, 1872.

(S'gn'd) J. C. FLOURNOY, *Sh'ff,*
By T. D. PATTERSON, *Dep. Sh'ff.*

7 *1st citation of garnishment.*

THE STATE OF ALABAMA,
Barbour County:

To James G. L. Martin & James H. G. Martin:

Whereas a suit has been commenced by attachment in the city court of Eufaula, in said State, returnable to the next term of said court,

wherein Mary C. Kolb is plaintiff & the State Insurance Company of Missouri, a corporation, is defendant, for the sum of eight thousand dollars & interest, which attachment has been placed in my hands for the due execution thereof: These are, therefore, to command you that you personally appear before the honorable the judge of the said city court of Eufaula, at the next term of said court, then and there to answer, on oath, within the first four days of said term, what you are indebted to said defendant, and what effects of said defendant you have in your hands, and had at the time of the service hereof, and what effects or debts of the said defendant there are in the hands of any other & to
8 what persons, to your knowledge and belief.

Witness J. C. Flournoy, sheriff of Barbour County, this the 4th day of June, 1872.

J. C. FLOURNOY, *Sh'ff.*
Per T. D. PATTERSON, *Dep Sh'ff.*

2nd citation of garnishment.

THE STATE OF ALABAMA,
Barbour County:

To C Rhodes, T. J. Perkins, M. M. Barrenger, W. H. Locke, J. C. McKenzie, W. E. Besson, Marburg & Lorch, and John N. Webb:

Whereas a suit has been commenced, by attachment, in the city court of Eufaula, returnable to the next term of said court, wherein Mary C Kolb is plaintiff and the State Insurance Company of Missouri, a corporation, is defendant, for the sum of eight thousand dollars & interest, which attachment has been placed in my hands for the due execution thereof: These are, therefore, to command you that you personally be and appear before the hon. judge of the said city court of Eufaula, at the next term of said court, then and there to answer on oath
9 within the first four days of said term, what you are indebted to said defendant; what effects of said defendant you have in your hands, and had at the time of the service hereof, and what effects or debts of the said defendant there are in the hands of any other and to what persons, to your knowledge and belief.

Witness J. C. Flournoy, sheriff of Barbour County, this the 28th day of November, 1872.

J. C. FLOURNOY, *Sh'ff,*
Per T. D. PATTERSON,
Deputy Sh'ff.

Complaint.

In the city court of Eufaula, June term, 1872.

MARY C. KOLB
vs.
STATE INSURANCE COMPANY OF MISSOURI. } Complaint.—Attachment.

The plaintiff claims of the defendant, a corporation chartered by the State of Missouri, the sum of eight thousand dollars, besides interest, due upon a certain policy of insurance issued by the defendant, a corporation, to the plaintiff, on the 29th day of November, A. D. 1871, by which policy or contract of insurance the defendant insured the

10 *the* plaintiff for a valuable consideration, paid by the plaintiff to the defendant, against loss or damage by fire, to the amount of eight thousand dollars, for the term of one year from said 29th day of November, A. D. 1871, on her brick, metal, and slate-roof building, used by her as a residence, situated on the west side of Randolph street, in the city of Eufaula, in Barbour County, Alabama, and which said building was totally destroyed by fire, on the 29th day of January, A. D. 1872. And plaintiff avers that said State Insurance Company of Missouri, the defendant herein, has had due notice of said loss and destruction, and altho' often requested, the said defendant has failed & refused to pay to the plaintiff the amount due by them upon said policy or contract of insurance, to wit, the sum of eight thousand dollars, with interest; wherefore she brings this suit.

JNO. M. McKLEROY &
SHORTER & BROTHER,
Plaintiff's Att'ys.

Clerk' indorsement.

Filed in office August 8th, 1872.

A. L. SPENCE, *Clk.*

11 *1st answer of garnishee.*

DECEMBER 14TH, 1872.

MARY C. KOLB
v.
STATE INSURANCE COMPANY OF MISSOURI, & J. G. L. Martin & Jas. H. G. Martin, garnishees. } 312.

This day came J. G. L. Martin, garnishee, and, for answer to the notice of garnishment in this case, states on oath, in open court, that he is a member of the firm of J. G. L. Martin & Son; that his firm collected one thousand dollars on five of the notes given for stock in said insurance company; that said company owed said firm about sixty dollars, and that his firm has the balance, say about nine hundred & forty dollars in their possession. Garnishee also answers that his firm subscribed for ten shares of stock of said insurance company & paid two hundred dollars, and had been called on for one hundred dollars, but were estop'ed from paying said one hundred dollars by service of notice of garnishment in this cause.

Cause continued.

MARY C. KOLB
vs.
12 STATE INSURANCE COMPANY OF MISSOURI, defendants, in attachment, & C. Rhodes, John N. Webb, T. J. Perkins, J. C. McKenzie, W. E. Besson, M. M. Berringer, W. H. Locke, and Morburg & Lorch, garnishees. } 373.—Attachment.

DEC. 14TH, 1872.

This day come the garnishees, W. H. Locke and M. M. Berringer, who, for answer to the notices of garnishment in this case, answer in open court, under oath, that they subscribed for stock in said insurance

company; gave their notes for two hundred dollars each, and afterwards paid said notes; that they were assured by the agent that they would not be called on for any further payment; that this was the opinion of the agent. They further say that they do not consider they owe the company anything, according to the contract. They do not remember any contract made that they should not pay further installments, but the agent told them they would not be called on to pay any more. They say they were called on for further installments, but refused to pay them, because they did not believe they owed them. Gar-
13 nishees, Besson and McKenzie, also came into open court, and upon oath say that they make the same answer as the said Locke & Berringer, except that they did not pay the two hundred dollars, as paid by the said Locke and Berringer. Also came the said John N. Webb, and filed his written answer under oath, which is in words and figures following, to wit:

Answer of garnishee Jno. N. Webb.

In city court of Eufaula, December term, 1872.

MARY C. KOLB
vs.
STATE INSURANCE COMPANY OF MISSOURI, deft., John N. Webb, garnishee.

In open court, comes John N. Webb, the garnishee, and for answer to the said citation of garnishment, on oath says, that in the spring of the year 1871, he subscribed to ten shares of the capital stock of said insurance company; that the said shares were for one hundred dollars each; that an installment of two hundred dollars or twenty per centum
14 of said subscription was to be paid sixty days from the date of said subscription, and for this sum said garnishee executed his promissory note to said insurance company, and said note has never been paid by the garnishee; that since the date of his said subscription and since the date of his said promissory note, the said State Insurance Company of Missouri has called on this garnishee for another installment of ten per centum upon his said subscription, and that this garnishee has not paid said installment so called for. And this garnishee further answers, that he did not pay his said promissory note and the said installment of ten per centum so called for, because he did not consider said insurance company a sound or solvent company, and because the said company did not issue to this garnishee any certificate of stock for which he had subscribed. He obtained his information as to the soundness of said company only after he had subscribed for said stock.

JOHN N. WEBB.

15 Sworn to and subscribed before me this 14th day of December, A. D. 1872.
(Sign'd) A. T. SPENCE, *Clerk.*

(Endorsed:) Filed in open court Dec. 14th, 1872.
(S'gn'd) A. T. SPENCE, *Clerk.*

Application to transfer the case to U. S. cir. court.

In the city court of Eufaula in said county, December term, 1872.

THE STATE OF ALABAMA,
Barbour County:

To the honorable the city court of Eufaula, Barbour County, now in session:

The petition of the State Insurance Company of Missouri, a foreign corporation, chartered by the legislature of the State of Missouri, in accordance with the constitution and laws of said State of Missouri, showeth unto the court, that heretofore, on the third day of June, A. D. 1872, Mary C. Kolb caused a suit to be commenced in this court, by attachment, sued out against the petitioner for the sum of eight thousand dollars, with legal interest from maturity of a policy of insurance issued by the said petitioner on the 29th day of November, 1871, purporting to insure against fire a brick, metal, and slate-roof building lying and being in the city of Eufaula,
16 State and county aforesaid, for one year, beginning at noon on the said 29th day of November, 1871, and terminating at noon on the 29th day of November, A. D. 1872; and alleging that the said policy of insurance was issued by petitioner to plaintiff, the said Mary C. Kolb, and alleging that the said building was totally destroyed by fire on the 29th day of June, 1871. And your petitioner avers that the said suit is now pending in this court; that at and before the commencement of said suit, and now, your petitioner, the defendant in said suit, was not, and is not, a citizen of said State of Alabama, and does not, and did not, reside therein, but was then, and now is, a citizen of the State of Missouri aforesaid, and did then, and does now, reside in the State of Missouri; that the suit now pending in the city court of Eufaula presents a controversy between a citizen of the State of Alabama (the said Mary C. Kolb being a resident citizen of the county of Barbour and State of Alabama, in which said suit is still
17 pending) and a citizen of another State, to wit, the State of Missouri, in which your petitioner, who is defendant in said suit, resides alone, and has citizenship: and that the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs.

And your petitioner, by John N. Strong, who is the secretary of your petitioner and who is the fully authorized agent of your petitioner, here states in open court, that he has reason to and does believe that, from prejudice or local influence, one or both, said defendant, who is your petitioner, will not be able to obtain justice in said city court of Eufaula and county of Barbour.

The premises considered, your petitioner prays an order of this court for the removal of said suit into the next circuit court of the United States, to be held in this, the district in which said suit is pending. And your petitioner hereby offers good and sufficient security, by bond,
18 with security which is made a part of this petition for this defendants entering in said circuit court of the United States on the first day of its session, copies of all process, pleadings, depositions, testimony and other proceedings in said suit, and to do such other appropriate acts as by the rules of said circuit court of the United States and by the acts of Congress are required to be done upon the removal of a suit from a State court into the United States courts.

And petitioner will ever pray, &c.

(S'gn'd) A. H. MERRILL,
JOHN COCHRAN,
Att'ys for Petitioner.

Verification of petition.

THE STATE OF ALABAMA,
Barbour County:

In person came John N. Strong, secretary and authorized agent of the defendant and petitioner, after being duly sworn that the statements in the foregoing petition are true in substance and in fact as therein stated and set forth.

(S'gn'd) JOHN N. STRONG.

19 Sworn to and subscribed before me, this the 7th day of June, 1872.

B. B. FIELDS,
Notary Public, ex-officio Justice of the Peace, in and for the County of Barbour and State of Alabama as aforesaid.

Petitioner's bond.

THE STATE OF ALABAMA,
Barbour County:

Know all men by these presents that we, the State Insurance Company of Missouri, Thomas K. Ferguson and N. Woodruff, are held and firmly bound unto Mary C. Kolb in the penal sum of one thousand dollars; for the true payment of which well and truly to be made, we bind ourselves and each of us, our heirs, representatives, assigns, and successors, by these presents, sealed with our seals and dated this the 7th day of June, 1872. The condition is such, that whereas Mary C. Kolb has a suit now pending in the city court of Eufaula against the State Insurance Company of Missouri, presenting a controversy
20 between citizens of two different States, in which the amount in dispute exceeds the sum of five hundred dollars, exclusive of costs, which suit the State Insurance Company of Missouri prays to be removed into the next circuit court of the United States to be held for Alabama, in the city of Mobile: Now, if the said defendant, to wit, the State Insurance Company of Missouri, (having obtained the order of the said city court of Eufaula for the removal,) shall file in said circuit court at Mobile, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and shall do and perform all such acts as are required to be done and performed upon the removal of a suit into the United States court, then the above bond to be void; otherwise to remain in full force and virtue in law.

(S'gn'd) STATE INSURANCE COMPANY OF MISSOURI,
By J. T. K. FERGUSON, *President.* [SEAL.]
THOS. K. FERGUSON. [SEAL.]
N. WOODRUFF. [SEAL.]

21 THE STATE OF ALABAMA,
Dallas County:

I, J. B. Phillips, notary public for said county, hereby certify that Thos. K. Ferguson and N. Woodruff, whose names are signed to the foregoing bond and who are known to me, acknowledged before me on this day that, being informed of the contents, they executed it on the day the same bears date. I hereby further certify that the said Thos.

K. Ferguson and N. Woodruff are residents of the county of Dallas, State of Alabama.

In witness whereof I hereby set my hand and seal of office this June 22nd, 1872.

(S'gn'd) J. B. PHILLIPS,
Notary Public for Dallas County.

Clerk's endorsement.

Filed in office December 11, 1872.
(Signed) A. T. SPENCE, *Clerk.*

Order to transfer to U. S. cir. crt. at Mobile.

MARY C. KOLB
vs.
STATE INSURANCE COMPANY OF MISSOURI, def'ts attached, and C. Rhodes, John N. Webb, T. J. Perkins, J. C. McKenzie, W. E. Besson, M. M. Berringer, W. H. Locke, and Marburg & Lorch, garnishees.

373.—Attachment, January 11th, 1873.

22 This day the parties came by their attorneys, and it being shown to the court that the defendant in this cause is a non-resident, and that the amount sued for is over five hundred dollars, exclusive of costs; and upon the application of defendant, by petition and affidavit, he having given bond with good and sufficient security, approved by the court as required by the act of Congress in such cases: It is therefore ordered and adjudged, by the court, that this cause be removed out of this court into the circuit court of the United States at Mobile, Alabama, that being the circuit court of the United States for this district. And it is further ordered that the clerk of this court transmit to the said circuit court of the United States, by the first day of the next term thereof, copies of all process, pleadings, depositions, testimony, and all other proceedings pertaining or relating to said cause.

23 *Clerk's certificate.*

THE STATE OF ALABAMA, *Barbour County:*

I, A. T. Spence, clerk of the city court of Eufaula in said State and county, and keeper of the records and seals of said court, do certify that the foregoing fifteen pages contain a correct copy of all the proceedings on file or of record in the case therein stated of Mary C. Kolb *vs.* The State Insurance Company of Missouri.

In witness whereof, I hereunto set my hand and seal of office this the 18th day of January, A. D. 1873.

(S'gn'd) A. T. SPENCE,
Clerk City Court.

U. S. circuit so. dist. Alabama.

MARY C. KOLB
vs.
STATE INSURANCE COMPANY OF MISSOURI.

Filed February 3rd, 1873.
(S'gn'd) N. W. TRIMBLE, *Clerk.*

And the defendant produced and read to the court the docket,
24 minute entries, and proceedings had in this cause in this court, since said transcript was so filed, and also produced the depositions of five witnesses taken in said cause in this court, and since it was docketed in this court, upon interrogatories filed by the plaintiff, and upon commissions sued out by the plaintiff therein, and issued by the clerk.

After argument had, the court ordered and adjudged that said cause be stricken from the docket, for the want of jurisdiction in this circuit court to hear and determine the same, and directed the clerk of this court to certify its action in the premises to the city court of Eufaula, Alabama; and the defendant excepted to the order of the court striking the cause from the docket, and refusing to entertain jurisdiction of said cause, and to the order of the court to the clerk of this court to certify its action to the city court of Eufaula, Alabama. And for the
25 purpose of this bill of exceptions, the transcript of the record filed in said cause in this court, and the proceedings had in this cause in this court, are made a part of the record in this cause.

And this bill of exceptions is signed and sealed in term-time this 24th day of December, 1873.

(S'gn'd) W. B. WOODS, [SEAL.]
Judge.

Circuit court of the United States for the fifth judicial circuit and southern district of Alabama, December term, A. D. 1872, Hon. W'm B. Woods, judge, presiding.

* * * * * * *

TUESDAY MORNING, *February 4th*, 1873.

Court met pursuant to adjournment. Present, Hon. W'm B. Woods, judge, and Hon. Richard Busteed, associate judge, &c.

26 MARY C. KOLB
vs.
STATE INSURANCE COMPANY OF MISSOURI. } 367.

This cause is continued, by consent, until the next term of the court. Rice and Pugh appear for the plaintiff.

Circuit court of the United States for the fifth judicial circuit and district of Alabama, April term, 1873. Present, Hon. W. B. Woods, judge, &c.

* * * * * * *

SATURDAY MORNING, *April 19th*, 1873.

Court met pursuant to adjournment. Present, Hon. W. B. Woods, judge, &c.

MARY C. KOLB
vs.
STATE INSURANCE COMPANY OF MISSOURI.

In this cause it is ordered that the testimony be published.

27 *Motion.*

MARY C. KOLB
vs.
STATE INSURANCE COMPANY OF MISSOURI.

Motion is made in this cause by the defendant to quash the attachment issued in this cause upon the grounds and for the reasons following:

1st. That no attachment-bond was given, payable to the defendant, as required by the laws of Alabama, before the issue of said attachment, and no sufficient excuse is shown why such bond was not made.

2nd. The affidavit on which said attachment issued is not made in compliance with the statute of Alabama, in such cases provided, and does not set forth a case in which an attachment could issue under the law.

(S'gn'd) JOHN T. MORGAN,
Attorney for Defendant.

Filed April 14th, 1873.
(S'gn'd) N. W. TRIMBLE, *Clerk.*

Memorandum from docket.

Commission to M. B. Wellborn, of Eufaula, Ala., to take testimony.

28 MONDAY MORNING, *April 21st*, 1873.

Court met pursuant to adjournment. Present, Hon. Wm. B. Woods, judge, &c.

MARY C. KOLB
vs.
STATE INSURANCE COMPANY OF MISSOURI. 367.

This cause is continued until the next term of the court, both as to cause and the motion to quash the attachment.

Circuit court of the United States for the fifth judicial circuit and southern district of Alabama, December term, A. D. 1873.

Present, Hon. W. B. Woods, judge presiding, &c.

* * * * * * * *

TUESDAY MORNING, *December 23rd*, 1873.

Court met pursuant to adjournment. Present, Hon. W. B. Woods, judge, &c.

29 MARY C. KOLB
vs.
STATE INSURANCE COMPANY OF MISSOURI. 367.

This cause coming on to be heard on the motion of the plaintiffs to remove said cause to the city court of Eufaula, for Barbour County, of the State of Alabama, on the ground that this court has no jurisdiction of the same, and said motion having been argued by counsel, after deliberation, it is considered by the court, that the circuit court of the United States, for the southern district of Alabama, has no jurisdiction of this

cause, and that it does decline to entertain the same; and that the clerk of this court is ordered to advise the city court of Eufaula, for Barbour County, of this action of the court, by sending to the clerk of said city court a certified copy of this order.

It is further ordered that the clerk of this court delay for thirty days the sending of said certified copy to said clerk at Eufaula, Alabama.

30 I, Nathaniel W. Trimble, clerk of the circuit court of the United States for the fifth judicial circuit and southern district of Alabama, hereby certify the foregoing pages, from 1 to 29 inclusive, contain a true and correct transcript of the record, bill of exceptions, motions, orders, and minutes, as the same appear of record in my office, in the cause wherein Mary C. Kolb is plaintiff, and the State Insurance Company of Missouri is defendant.

In testimony whereof, I hereunto subscribe my name, and cause the seal of said court to be affixed, this 29th day of December, anno Domini 1873.

[SEAL.] Attest: NATHANIEL W. TRIMBLE,
Clerk U. S. Cir. Crt. 5th Judicial Cir. and So. Dist. Ala.

(Indorsement on cover:) No. 10. Ex parte: In the matter of the State Insurance Company of Missouri, petitioner. Petition for a writ of mandamus to the circuit court of the United States for the southern district of Alabama, at Mobile. Original action. Filed 19 January, 1874.

Supreme Court of the United States.

Ex-parte.

THE STATE INSURANCE COMPANY OF MISSOURI.

Motion for rule nisi to the Circuit Court for the Southern District of Alabama.

JOHN T. MORGAN, *Attorney for Petitioner.*

Judd & Detweiler, Printers.

Supreme Court of the United States.

Ex-parte.

THE STATE INSURANCE COMPANY OF MISSOURI.

Motion for rule *nisi* to the circuit court for the southern district of Alabama, at Mobile, to show cause why the case of Mary C. Kolb against said The State Insurance Company of ~~Michigan~~ should not be restored to the docket, and further proceedings had therein according to law.

The Case.

This record shows that Mary C. Kolb had sued The State Insurance Company of Missouri, a body corporate, having its official residence and citizenship in Missouri, on a policy of insurance against loss by fire. The suit was commenced by attachment, issued by a justice of the peace, returnable to the city court of Eufaula, Alabama.

The process was served by a levy in the hands of garnishees. At the return term of the process, the defendant petitioned the court to remove the cause into the circuit court for the southern district of Alabama, at Mobile. The petition was heard and granted by the court. Bond with security was given by the defendant, conditioned as required by the laws of the United States, for the removal of the papers, and docketing the cause, and appearing in the same.

The papers in the cause were accordingly filed in said circuit court, prior to March 3, 1873. The parties, by their counsel, appeared in said cause in the circuit court. The

Missouri

plaintiff's counsel proceeded to take several depositions in the cause, and the defendant's counsel entered a motion to quash the attachment, which was the leading process in the cause, for defects apparent on the face of said proceedings.

At the December term, 1873, of the said circuit court, the plaintiff in said suit moved the court to strike the cause from the docket for the want of jurisdiction, and to remand the same to the city court of Eufaula for further proceedings therein.

A bill of exceptions, signed by the circuit judge, presents the foregoing facts, and also that the city court of Eufaula is in the middle district of Alabama, in Barbour county.

The plaintiff in said action now moves the court for a rule *nisi* to said circuit court of the United States, that it may show cause why said suit should not be restored to the docket, and proceeded in according to law.

The circuit court, having fully set forth the grounds of its action in refusing to hear and determine said cause, it is further prayed that the rule be made absolute.

Argument.

The supreme court of Alabama, in *ex parte* Groom, 40 Ala. Rep., 731, decided that causes removed from the counties composing the middle district of Alabama to the circuit court of the United States, under the provisions of the acts of Congress, could only be removed to the circuit court of the United States at Mobile.

The decision of the court turns upon the fact that the several acts of Congress providing for the removal of causes from the State courts require them to be carried into the next circuit court to be held in the district, where the suit is pending in the State court. The circuit courts alone are named in the acts of Congress, and it does not meet the spirit or letter of these laws to transfer such causes to district courts having circuit court powers. It is the right of

the party to have his cause tried in a circuit court of the United States, where circuit judges may preside.

The court goes still further, and holds that in the arrangement of the circuits by act of Congress, but one circuit court was provided for Alabama, and that court was established for "the district of Alabama," and it was required to sit at Mobile.

The court seems to adopt the idea that in re-organizing the circuits it was the intention of Congress to distinguish between the districts organized for the district courts and those arranged for the circuit courts.

We will not undertake to amplify the argument so well stated by the supreme court of Alabama.

A very thorough review of the statutes relating to the circuit and district courts of the United States was made by Judge Woods in an opinion delivered in the case of Anthony & Herbert *vs.* Helms & Coster, at the April term, 1873, of the United States circuit court at Mobile. We here print the opinion, for the purpose of setting forth fully the views and rulings of the learned judge upon all these statutes:

United States Circuit Court, Southern District of Alabama.

ANTHONY & HERBERT *vs.* MOSES W. HELMS AND JOHN J. CARTER.

JOHN T. MORGAN AND JOHN MCCLERY, *for Plaintiffs.*

ELI S. SHORTER, *for Defendants.*

Opinion by Woods, Judge.—The defendants in this action have filed a plea in abatement to the declaration, in which they allege that they are resident citizens of the middle district of Alabama, said Moses W. Helms, of Henry county, and said John J. Carter, of Barbour county, and they pray judgment whether this court will or ought to take further cognizance of this suit. To this plea the plaintiffs have filed a demurrer, and allege as ground of demurrer that the plea shows that one of said defendants is a resident citizen of Henry county, and the other of Barbour county, Alabama,

and although said plea avers that said counties are in the territory designated as the Middle District of Alabama, the said designation has reference alone to the jurisdiction of the United States district court over said district, but does no apply to or affect the jurisdiction of this court over the same territory. The question presented by this plea must be determined by a consideration of the several acts of Congress relative to the jurisdiction of the United States courts within the State of Alabama. The act which has raised this question is the recent law of Congress, approved March 3, 1873, of which the following is a copy :

A bill relating to the circuit and district courts of the United States for the middle and northern districts of Alabama.

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled: SECTION 1. That so much of any act or acts of Congress as vests in the district court of the United States for the middle district of Alabama, and the district court of the United States for the northern district of Alabama, the power and jurisdiction of a circuit court, be, and the same is hereby repealed.

SEC. 2. That all civil causes, actions, suits, executions, pleas, process, and other pleadings now pending in said district courts of the United States for the middle and northern districts of Alabama, which might have been brought, and would have been originally cognizable in a circuit court, are hereby declared to be transferred to the circuit court of the district of Alabama ; and the clerks of said district courts shall transmit all the original papers in such causes, and a complete transcript of all the dockets, minutes, orders, judgments, and degrees in such causes, as the same appear of record in said district courts to said circuit court of the United States at Mobile, Ala.

SEC. 3. That nothing in this act contained shall apply to any indictment found by a grand jury, and now pending in either of said district courts ; nor shall anything contained in this act affect the jurisdiction or power of the Supreme Court of the United States to hear and determine any cause or proceeding now pending in said Supreme Court on writ of error or appeal from either of said courts for the middle and northern districts of Alabama.

SEC. 4. That hereafter the circuit court of the United States for the district of Alabama shall exercise appellate

and revisory jurisdiction over the decrees and judgments of said district courts of the United States for the middle district of Alabama, and the northern district of Alabama, under the laws of the United States conferring and regulating the jurisdiction, powers, and practice of the circuit courts in cases removed into said courts by appeal or writ of error.

The changes made by this act in the jurisdiction of the United States courts for the State of Alabama are extensive and radical. There can be no reasonable question that the act has effected these results.

1. It has taken from the district courts for the middle and northern districts of Alabama all the powers and jurisdiction of the circuit courts, conferred upon them by acts of Congress.

2. It has transferred to the circuit court at Mobile, from the district courts for the middle and northern districts, all causes and proceedings pending therein which might have been brought or would have been originally cognizable in a circuit court.

3. It has conferred on the circuit court at Mobile appellate and revisory jurisdiction over the judgments and decrees of the district courts for the middle and northern districts of the State, under the laws of the United States conferring and regulating the jurisdiction, power, and practice of the circuit courts in cases removed into said courts by appeal or writ of error.

Thus far the effect of the act is reasonably clear of doubt. The point about which there is controversy is touching the original jurisdiction of the circuit court at Mobile over cases where the defendants reside in the middle or northern districts. In other words, the question is, whether, in view of all the legislation of Congress on the subject, the circuit court at Mobile has original circuit court jurisdiction over the entire State, or is the State, so far as said circuit court is concerned, but one district? It is conceded that the act of March 3, 1873, does not, in express terms, confer such jurisdiction upon the circuit court at Mobile, nor does it expressly enact that the State shall constitute but one district for circuit court purposes. The circuit court at Mobile is twice in the act called the circuit court for the district of Alabama, and these are the only ex-

pressions indicating a purpose to make the State one district for the exercise of the original jurisdiction of a circuit court.

As the terms of the act of 1873 leave us in doubt upon the question under consideration, we must consider the previous legislation of Congress on the subject. By the act approved Dec. 14, 1819, (3 Stat., 608,) the Territory of Alabama was admitted as a State in the Union, and by the same act it was provided that all laws of the United States which are not locally inapplicable shall be extended to the State of Alabama, and shall have the same force and effect within the same as elsewhere within the United States. The first act relative to the United States courts within the State was approved April 21, 1820, (3 Stat., 564,) and declares that "the said State shall be one district, and a district court shall be held therein, to consist of one judge," who shall in all things exercise the same jurisdiction and powers given by law to the judge of the Kentucky district by certain specific acts of Congress. The effect of this act was to give the district court of the State the powers and jurisdiction of a circuit court. The same act provides for the appointment of a United States attorney and marshal in said district. Under this act the district of Alabama, as Maine and Kentucky, under the judicial act of September 24, 1789, was not attached to any organized circuit, but appeals and writs of error lay from its district court direct to the Supreme Court of the United States.

By an act approved November 17, 1820, the times for holding the district court for the district of Alabama, were changed, and it was provided that there shall be but one clerk of said district and but one set of records. The next act on the subject of the United States courts in Alabama was approved March 10, 1824, and is entitled "An act for the better organization of the district courts of the United States within the State of Alabama." It divides the State into two districts, to be called the northern district of Alabama and the southern district of Alabama; and provided for two terms annually of the district court in the southern district at Mobile, and one term at Cahaba, and one term of the northern district to be held at Huntsville.

The 6th section of this act provided that all suits hereafter to be brought in either of the courts aforesaid not of a local nature shall be brought only in the district where the defendant shall reside, but if there be more than one defendant,

and some reside in the northern and some in the southern district, the plaintiff may sue in either, and send a duplicate writ to the other, in which he shall endorse that it is part of a suit brought in the district from which it is sent, and said writs, when executed and returned, shall constitute one suit. An act, approved May 22, 1826, (4 Stat., 192,) changed the time of holding the district courts in the district of Alabama. An act, approved January 27, 1831, (4 Stat., 434,) changed the time for holding the district court for the northern district of Alabama. An act, approved March 2, 1827, (4 Stat., 226,) changed the time of holding the district court for the southern district of Alabama, and transferred all causes pending in the district court theretofore held at Cahaba, to the court at Mobile. By an act, approved February 19, 1831, (4 Stat., 441,) it was provided that the district courts for the northern and southern districts of Alabama should, in addition to the ordinary jurisdiction and powers of a district court, have within their respective districts jurisdiction of all causes, except appeal and writs of error, which then were or might thereafter be made cognizable in a circuit court, and should proceed in the same manner as in a circuit court. This last act conferred upon those district courts the same powers conferred upon the district court for the district of Alabama, approved April 21, 1820, and was, perhaps, passed to remove a doubt whether, after the division of the State into two districts, and the organization of two district courts, the latter still retained circuit court powers and jurisdiction. There was no further legislation affecting the United States courts for the State of Alabama until the passage of the act, approved March 3, 1837, entitled an act supplementary to the act entitled an act to amend the judicial system of the United States (5 Stat., 176.) The first section of this act declares, among other things, that the districts of Alabama, the eastern district of Louisiana, the district of Mississippi, and the district of Arkansas, "shall form and be called the ninth circuit." The second section provides that the sessions of said circuit courts shall be held twice each year in the following districts, to wit: * * * in the southern district of Alabama, at Mobile, on the second Monday of April and the second Monday of October; * * * at Huntsville, in the northern district of Alabama, on the first Monday of June. The third section declares that "so much of any act or acts of Congress as vests in the district courts

of the United States for * * * the district of Alabama, or either of them, the power and jurisdiction of circuit courts, be, and the same is hereby, repealed, and there shall hereafter be held circuit courts for said districts by the chief or associate justices of the Supreme Court assigned or allotted to the circuit to which such districts may respectively belong, and the district judges of such districts, severally and respectively, either of whom shall constitute a quorum, which circuit courts and the judges thereof shall have like powers and exercise like jurisdiction as other circuit courts, and the judges thereof." The 4th section transfers from the said district courts of the district of Alabama to the said circuit courts all suits pending in said district courts in April next after the passage of the act which would have been originally cognizable in a circuit court, and declares that "said circuit courts shall be governed by the same laws and regulations as apply to the other circuit courts of the United States." By an act approved February 22, 1838, entitled "An act to abolish the circuit court at Huntsville, in the State of Alabama, and for other purposes," (5 Stat., 210,) it was declared (sec. 1) that the circuit court of the United States, established at Huntsville, Alabama, by the act of March 3d, 1837, be, and the same is hereby, abolished, and (sec. 2) that all the jurisdiction which belonged to the district court of the United States for the northern district of Alabama, at Huntsville, at and before the passage of the said act of March 3, 1837, be, and the same is hereby, restored to and vested again in said district court, and that all causes at law or in equity pending in said circuit court be transferred to said district court. Section 5 of this act provided that appeal shall lie from the said district court to the circuit court of the United States at Mobile, in the State of Alabama. Next comes the act approved February 6, 1839, entitled, "An act to reorganize the district courts of the United States in the State of Alabama." This act (sec. 1) provided that the county of Walker and thirteen other counties named should compose one district, to be called the middle district, and a court should be held for said district at Tuskaloosa; that the county of Jackson and sixteen others named should compose the northern district, and a court for the same should be held at Huntsville; and the residue of the counties should compose the southern district, and a court for the same should be held at Mobile. Sec. 4 enacted

that all causes at law or in chancery pending in the said district courts at Mobile and Huntsville or in the circuit court of the United States at Mobile, in which the defendant or defendants resided in the middle district (as hereby established) at the time of serving process shall be transferred for trial to the district court for the middle district, and be proceeded in, heard, adjudged and determined in the same manner as though originally commenced and prosecuted in said court; section 5 of the same act declared that all suits hereafter to be brought in either of said courts, not of a local nature, shall be brought in a court of a district where a defendant resides, but if there be more than one defendant, and they reside in different districts the plaintiff may sue in either, and send duplicate writ or writs to the other defendants; section 8 of the act provided that the district court for the middle district should, within the limits of said district have the powers and jurisdiction of a circuit court; section 9 provided that appeals and writs of error should lie from the district court at Tuscaloosa to the circuit court of the United States at Mobile, in the State of Alabama. By an act approved August 4, 1842, it was provided that appeals and writs of error should lie directly to the Supreme Court of the United States from the district court of the northern district at Huntsville, when the amount in controversy exceeded $2,000, (5 Stat., 504.) An act approved August 7, 1848, entitled, "an act to change the place of holding the district court of the United States for the middle district of Alabama, and for other purposes," (9 Stat., 274,) it was declared that the State should be divided into three districts, as follows: The counties of Mobile, Washington, Baldwin, Sumter, Clark, Marengo, Green, Pickens, Monroe, Wilcox, Conecuh, should compose the southern district; the counties of Montgomery, Autauga, Coosa, Tallapoosa, Chambers, Talladega, Randolph, Macon, Russell, Barbour, Pike, Henry, Dale, Coffee, Covington, Lowndes, Dalles, Perry, Bibb, Shelby, and Tuskaloosa should compose the middle district, and the residue of the counties of the State the northern district.

The same act provided that the district court for the middle district should be held at Montgomery, instead of Tuscaloosa, and for the removal of all causes pending in the district courts at Huntsville and Mobile, and in the United States circuit court at Mobile, in which the defendant or de-

fendants resided in the middle district, as constituted by said act, to the said district court for the middle district; and the same should be proceeded in and adjudged as if it originally commenced in said court. The districts as organized by this act remain to this day the districts into which the State is divided, save that by the act of May 4, 1852, (10 Stat., 5,) it is provided that the county of Butler shall form a part of the middle district. By the act of April 10, 1869, it was provided that for each of the nine existing judicial circuits there should be appointed a circuit judge, etc., (16 Stat., 44,) and by the act of July 1, 1870, it is provided that the act of April 10, 1869, *supra*, shall not be so construed as to require a circuit court to be held in any judicial district in which a circuit court was not required to be held by previously existing laws, (16 Stat., 179.) An act was approved on July 15, 1862, (12 Stat., 576,) which provided, among other things, that the districts of South Carolina, Georgia, Alabama, Mississippi, and Florida, should constitute the fifth circuit; and the circuit courts in the districts heretofore included within any circle of the United States which, by said act, were attached to a different circuit, should be held at the same times and places as were then prescribed by law, and the circuit courts in districts which, by this act, are for the first time attached to circuits, should be held at the same times and places as were then prescribed by law for holding the district courts in said districts. By an act approved July 23, 1866, entitled "An act to fix the number of judges of the Supreme Court, and to change certain judicial circuits," (14 Stat., 209,) it was provided, among other things, that the districts of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas, should constitute the fifth circuit. The fifth circuit, as constituted by this act, remains the fifth circuit to this day, and this is the last act having any special reference to the United States courts in the State of Alabama until the passage of the act of March 3, 1873, now under consideration. From this review of the statutes touching the organization and jurisdiction of the United States courts in the State of Alabama, it will be observed that by the act of 1821 the State constituted one district, in which a district court was established with circuit court powers, but the district was not attached to any circuit; that by the act of 1824 the State was divided into two districts, with a district court having circuit court powers in each; that this condition of

things lasted until the act of March 3, 1837, by which, for the first time, the districts of Alabama were attached to an organized circuit, namely, the ninth.

By this act also the first circuit courts were established in the State: one for the southern district, at Mobile, and one for the northern district, at Huntsville; and the district courts were robbed of their circuit court powers, and made tribunals distinct and separate from those circuit courts. Here, then, is a fair starting-point for our inquiry. Has there, since the passage of the act of 1837, by which two circuit courts were established, been any legislation which extends the jurisdiction of the circuit court at Mobile throughout the State? Let it be remembered that on and after the passage of the act of 1837, the jurisdiction of the circuit court for the southern district, was confined to that district. Now, by what legislation has it been extended to the whole State?

The circuit court, at Huntsville, established by the act of 1837, was abolished in express terms by the act of February 22, 1838, and the jurisdiction and power of a circuit court, were again conferred upon the district court for the northern district. By this act, appeals and writs of error lay from the district court at Huntsville to the circuit court at Mobile, but no original jurisdiction was conferred upon the last-named court, over the territory embraced in the northern district. The act of February 6, 1839, established the middle district and created for it a district court with circuit court powers. But this act did not in any way extend the jurisdiction of the circuit court at Mobile. It provided for appeals and writs of error from that court to the circuit court at Mobile, but gave the circuit court no original jurisdiction over the territory of the middle district; on the contrary, the jurisdiction of the circuit court at Mobile was in effect excluded from the middle district by the provision conferring circuit court powers on the district court for the middle district, and by the provision declaring that suits thereafter to be brought in either of said courts, not of a local nature, should be brought in the court of a district where a defendant, or at least one of several defendants, reside. And unless repealed by the act of March 3, 1873, this last provision of law is in force to-day. Since the passage of the act of February 6, 1839, no act has been passed, until the act of March 3, 1873, materially changing the jurisdiction of the

Federal courts of the State. The middle district has been enlarged by taking some counties from each of the other districts, and moving the court from Tuskaloosa to Montgomery. Appeals and writs of error have been allowed from the district court at Huntsville to the Supreme Court when the matter in dispute exceeded $2,000, leaving an appeal or writ of error to the circuit court at Mobile when the amount is less than $2,000; appeals and writs of error from the middle district to the circuit court in Mobile have been allowed in all cases.

With these changes the jurisdiction of the circuit court at Mobile appears to be left precisely where the acts of March 3, 1837, and February 6, 1839, left it. There is not a syllable in any act of Congress between the act of March 3, 1837, by which the circuit court of the United States for the southern district of Alabama was first established, and the act of March 3, 1873, which gives to said court any original jurisdiction whatever beyond the limits of the southern district—save in the case where one defendant resides in the southern district and one or more defendants in the other districts of the State. On the contrary, by the provision twice enacted that all suits not of a local nature brought in the district where the defendant resides, the original jurisdiction of the circuit court of Mobile was expressly excluded from the other districts. The provision already cited in the act approved July 15, 1862, (12 Stat., 576,) has been supposed to authorize the holding of circuit courts in the middle and northern districts of this State. This provision is in these words: "And the circuit courts in districts which by this act are for the first time attached to circuits, shall be held at the same times and places as are now prescribed by law for holding the district courts in said districts." This clearly does not refer to the districts of Alabama, for they were not by said act for the first time attached to a circuit, but had formed a part of an organized circuit ever since the passage of the act of March 3, 1837. A glance at other provisions of this act will explain the exact meaning of the passage quoted. By the first section, the districts of Texas, Florida, Wisconsin, Minnesota, Iowa, and Kansas, in all of which there had heretofore been no circuit courts, but only district courts with circuit court powers, was, for the first time, attached to organized circuits, and by the second section it was provided that there should thereafter be circuit

courts held for said districts, which circuit courts shall have like powers, and exercise like jurisdiction as other circuit courts. Now it is exceedingly clear that the purpose of the provision under consideration was simply to fix the times and place, for holding these newly created circuit courts, in the States in which they were then, for the first time, admitted to an organized circuit. The act of July 15, 1862, therefore, does not throw any light upon this investigation.

If therefore, the circuit court at Mobile has original circuit court jurisdiction, it must spring either from the judiciary act of 1789, as was claimed in argument, or from the act of March 3, 1873. It would be giving to the act of 1789 an extraordinary operation to hold that it could have any effect upon the jurisdiction of courts in a State which was not a part of the Union until thirty years after its passage. The act of 1789 provided for circuit courts and district courts in some districts, and in others (Maine and Kentucky) for district courts only, with circuit court powers.

Now it seems to be just as reasonable to suppose that when the act of 1873 abolished the circuit court powers of the district courts in the middle and northern districts, the same powers were at once restored to said courts by virtue of the act of 1789, as to hold that they were conferred on the circuit court of Mobile by virtue of the same act. Congress has never supposed that the act of 1789 possessed such miraculous powers. For on the admission of a State into the Union it has invariably provided that the laws of the United States not locally inapplicable should be of force in the new State, and has at once proceeded by direct legislation to establish Federal courts, sometimes both circuit and district courts, but usually district courts with circuit court powers, and fix the time and place where they should be held. We come back, therefore, to the act of March 3, 1873, as the only source from which circuit court jurisdiction for this court over the entire State can be drawn, if it can be drawn at all. As already stated, this act does not confer expressly circuit court jurisdiction; nor does it seem to me to be necessarily implied. The circuit court at Mobile is called twice in the act the circuit court of the district of Alabama; but when it is remembered that this court is the only circuit court in the State, and that, with the exception of the year when the circuit court for the northern district was in existence, is has been the only circuit court in the State since its admission to the

Union ; that at one time it had appellate jurisdiction over both the other districts, and retained it over the northern district until the present time, it will not seem strange that the court should be called the circuit court for the district of Alabama. But is not the naked fact that the court is so designated in the act of March 3, 1873, a most slender foundation upon which to build a circuit court jurisdiction for this court over the entire State? Will the bare fact that the court is so designated repeal the express provision of law that declares that suits not of a local nature shall be brought in a court of a district where the defendant resides? It may have been the purpose of Congress to confer the jurisdiction which is claimed for this court, and it seems probable that such was the case ; but the purpose is nowhere expressed in the act, and no court ought to exercise a jurisdiction that is not expressly conferred or necessarily implied. In the case of Green *vs.* Wood, (7 Queen's Bench Reports, 175,) Lord Denmar said : "We are bound to give to the acts of the legislature all possible meaning which is consistent with the language used ; but if we find language used which is incapable of a meaning, we cannot supply one. It is true that the words as they stand are useless—a case not infrequent. It is extremely probable that the alteration suggested would express what the legislators meant, but on looking at the words as judges, are no more justified to introduce that meaning than we should be if we added any other provisions. We can do no more than give such a meaning as the words authorize." By the statute under consideration it may have been the purpose of Congress to confer circuit court jurisdiction co-extensive with the State upon the circuit court at Mobile. Unless such jurisdiction is conferred, two-thirds of the State will be left without any court having the jurisdiction and powers of a circuit court. But Congress has failed to confer such jurisdiction on this court. We are not authorized to interpolate words into a statute, to insert a provision which the law-makers have left out. This would be to exercise legislative powers, and to supply by our own enactment the neglect of the law-givers. It seems to me clear that this is *casus omissus*. A part of this State is left without a circuit court ; we cannot create one, but must await the action of the law-making power. " We are bound," says Mr. Justice Butler, in Jones *vs.* Smart, 1 Term Rep., 44–52, "to take the act of Parliament as they have made it ; a

casus omissus can in no case be supplied by a court of law, for that would be to make laws." "Policy," says Mr. Justice Taunton, in the inhabitants of St. Gregory, D—— 597, "is a very questionable and unsatisfactory ground; the ground of public policy is a very unsafe one; it is best to adhere to the words of the act of Parliament." "Arguments drawn from impolicy or inconvenience," says Mr. Justice Story, "ought to have little weight." The only sound principle is to declare *ita lex scripta est* to follow and to obey. Nor if a principle so just could be overlooked could there be well found a more unsafe guide or practice than mere policy or convenience. (Conflict of Laws, 17.) In Jones *vs.* Rues, 2 Sumn., 354, the same eminent judge observes: "It is not for courts of justice *proprio mente* to provide for all the defects or mischiefs of imperfect legislation." In Priestman *vs.* The United States, 4 Dallas, 30, the Supreme Court of the United States says: "Of those rules of construction none can be more dangerous than that which, distinguishing between the intent and the words of the legislation, declare that a case not within the meaning of the statute according to the opinion of the judge, shall not be embraced within the operation of the statute, although it is clearly within the words, or *vice versa;* that a case within the meaning, though not within the words shall be embraced. We should invariably deem it our duty to defer to the expression of the legislation, to the letter of the statute, when free from ambiguity and doubt, without indulging in speculations either upon the impropriety or hardship of laws." These authorities justify me in the conclusion reached. I am constrained to hold that the original circuit court jurisdiction of this court is not either by virtue of the act of March 3, 1873, or any previous law, extended beyond the limits of the southern district of Alabama as now constituted; that this court has then no jurisdiction over the case of Anthony and Herbert *vs.* Moses W. Holmes *et al.*, and that the plaintiff's demurrer to the plea to the jurisdiction must be overruled.

The conclusions thus reached by Judge Woods do not necessarily dispose of this motion. We think the jurisdiction of the circuit court at Mobile to try causes transferred from any district in the State, is not necessarily dependent upon

the original jurisdiction of said court to hear and determine causes against defendants who may reside in the middle and northern districts of Alabama.

In the judicial act of 24th Sept., 1789, sec. 12, the removal of causes from State courts into the district courts of Maine and Kentucky was provided for. These, however, were exceptional cases. Since then, many district courts have been endowed with jurisdiction similar to the circuit court powers conferred on the district courts of Maine and Kentucky, but these acts have not provided for the transfer of causes from the State courts to such district courts. The act of Congress, 21st April, 1820, "To establish a district court in the State of Alabama," (3 Statutes, 564,) creates a district to be called "the Alabama district," and a court for said district, and gives to the judge "the same jurisdiction and powers which were by law given to the judge of the Kentucky district," under the acts of 24th September, 1789, and March 2, 1793. If this act gave to the district court for the "Alabama district," power to try causes removed from the State courts, the power extended over the entire State.

In 1824 Alabama was divided into two districts. In 1837 (5 Stat., 176) the entire State was included in the ninth circuit, and circuit courts were required to be held in both the districts. Thus the circuit court powers were extended over the entire State. In 1838 (5 Stat., 210) the circuit court for the northern district of Alabama was abolished, and the circuit court powers were restored to the district court, but it was subject to the appellate jurisdiction of the circuit court at Mobile. In 1839 the State of Alabama was divided into three districts, and the powers and jurisdiction of a circuit court were given to the district court for the middle district in general terms. (See act of February 6, 1839, 5 Stat., 315.) No reference is made in this statute to the acts creating the district courts of Maine or Kentucky.

The place of holding the district court for the middle dis-

trict was afterwards changed to Montgomery, and some slight readjustment of the counties comprising the districts was made.

As it relates to the middle district of Alabama, which was first created in 1839, we find that it had circuit court powers and jurisdiction, but it had not the exceptional authority to try causes transferred to it from the State courts. It could only have this power by statute, and it is a full answer to the claim of such power asserted for it that there was never such a statute. Barbour county, Alabama, has been in the middle district since it was first organized.

It is a mistake to suppose that, since 1837, any part of the State of Alabama has not been included in a circuit. The appellate jurisdiction of the circuit court of Mobile has all the time since 1837 been in full force throughout the State, as to all controversies in the district courts involving not less than fifty nor more than two thousand dollars.

The mistake has its origin in the fact that appeals and writs of error lay directly to the Supreme Court from the district courts, where the amount in controversy exceeded two thousand dollars. None of this peculiar legislation ever cut off the other large class of cases from the appellate jurisdiction of the circuit court.

It cannot, therefore, be maintained that the circuit court has been cramped down to the territorial limits of the southern district of Alabama. Its mandates and writs—at least such as belong to its revisory and supervisory jurisdiction—run to all the courts of the United States in Alabama, and have done so since 1837. If there has been a circuit court in Alabama whose powers, so far as they were not taken away by Congress, were coextensive with the limits of the State, and if this court has existed since 1837, and still exists, it is the circuit court for the "district of Alabama," or for the "districts of Alabama," or for the "Alabama district." By whatever name it is called, its powers, so far as they have

not been abridged by Congress, extend throughout the State.

The place of holding the court is in the southern district, but it is the circuit court for the middle district as to all matters of which it has not been deprived of jurisdiction.

Congress has never abridged the jurisdiction of this circuit court in the power to hear causes removed from the State courts of the middle district, either by direct enactment or by any implication. The district court of the middle district never had the power to try such causes, unless it was in fact a circuit court. No circuit or supreme court judge could ever preside there, and it could not be a circuit court.

The other important question decided by Judge Woods in the able opinion above copied, is not, perhaps, directly involved in this case, but it is of such general and grave importance that it ought to be settled by the Supreme Court if practicable.

It is not to be imputed to Congress that it acted hastily or unadvisedly in the passage of the act of March 3, 1873, set forth in Judge Wood's opinion. That law was framed and worded with the nicest and most accurate reference to the state of the then existing enactments on this subject. It found the judicial act of 24th September, 1789, (intended to operate as a judicial system throughout the Union, and operating as such, *proprio vigore*, when the machinery of the courts is supplied by Congress,) expressly extended to Alabama, as one district, by the act of April 21, 1820, which enacts: "That all laws of the United States, which are not locally inapplicable, shall be extended to the State of Alabama, and shall have the same force and effect within the same, as elsewhere within the United States."

This carried the judicial act into Alabama, and clothed every Federal court in that State with its appropriate power. This law has never been expelled from Alabama. Whenever a Federal court is formed there, this act supplies to it

the proper authority to assert its jurisdiction. The circuit court is in Alabama, and it has a vital existence and power throughout the State, which it has possessed since 1837. The only question therefore, is, to what persons and subjects that jurisdiction extends. In 1837 it had full jurisdiction, as a circuit court, throughout the State, but held two courts, in different districts. It was then confined, as to part of its jurisdiction, to the southern district, and its jurisdiction was abolished in the northern district, except as to appeals. It was never excluded from the middle district, except through the inference that it could not exercise its powers in a district where the district court had circuit court powers. These *obstructions* are repealed, and being removed, and the circuit court being duly organized in the State, and for the State, and with territorial jurisdiction coterminous with the State, it has all the powers conferred on it by the laws of Congress, without any need for an act of rehabilitation.

These powers may not include the right to issue a writ against a defendant in a district of the State in which he does not reside, yet the absence of this power would not disorganize the court, nor destroy its other jurisdiction.

We think the words used in the act of March 4, 1873, as descriptive of the territorial limits of the jurisdiction of the circuit court are very apt and accurate to convey the idea that this is coextensive with the State, and includes the whole power of the circuit court.

It is the 11th section of the judicial act of 1789, that restricts the jurisdiction of the circuit courts as to the persons of defendants, so as to require that they shall be sued in the districts where they reside. The local statutes applicable to Alabama relate only to suits in the district courts. In applying this general law to a case arising under it, the real point for consideration is, whether the term *district* as used in the act of March 3, 1873, and in the other acts relating to the circuit courts, means the district created as the boundary of district court jurisdiction, or the districts

which compose the circuits. In each case the word "district" is used to designate a territorial boundary. Is it always used as descriptive of the same territorial area? We think it is not always so used.

The original districts and circuits were all organized by the act of 24th September, 1789. States, or large bodies of territory, were then organized into districts. With such large territorial areas included in the districts, it was a serious evil to permit a person to be sued out of the district of his residence, and it was provided against in the 11th section of the act. Maine and Kentucky were larger than many others of the States, and it was then contemplated that they would soon be made circuits. We think that it was never intended that the circuit courts should lose their jurisdiction in parts of the territory of the States, unless the number of circuit courts should be increased to correspond with the number of new districts that might be created in them. So that, when States, constituting districts with reference to the circuit court organization, were sub-divided into other districts for district court purposes, such sub-division of the circuits did not render it necessary to have a court established in each district in order that the circuit court powers might be exerted therein.

It seems to us that it is not a correct view of the subject which requires that the circuit courts must be multiplied so as to have a court in every district court district, as the only means of dispensing the benefits of this high judicial power to the people. We think that Congress never meant to thus arrange the judicial system of the Federal Government. The plan intended is to have larger districts, each embracing a State, for the circuit courts, and smaller districts for the district courts.

Recently it has become a settled policy of Congress, as evinced in its course of legislation, to deprive the district courts of circuit court powers. A district court with circuit court powers is an anomaly in a judicial system. It is either a

court from which no appeal lies to the circuit court, or else the appeal is no more than a writ of error *coram nobis*. Congress has done wisely in purging this feature from the judicial system; it was supposed to have done this completely in the legislation of 1869, when it included every unattached (independent) district in a circuit, and *established* therein a circuit court. True, the language of the act seems to confine its application to such districts as had *never before* been attached to circuits; but such, it is submitted, is not the spirit of the law. The purpose was broad and full of meaning; it was a response to the demands of the country that circuit court powers should be exercised by circuit court judges. In criminal cases, where there is no appeal and no review, except from a divided court, it certainly is indispensable that the circuit court powers should not, in all cases, be exercised by one judge, and that one only a judge of the district court. Other evils, scarcely less obvious and important, led Congress to establish a circuit court in every district in the United States.

To fully accomplish this result, Congress, in organizing the circuits, and providing for circuit judges to aid in this great reform, ceased to regard the district system devised for the convenience of district courts, and formed circuits by grouping the districts in the States, as the districts of the circuit court system, and extended over them the jurisdiction of the circuit judges. It did not stop to consider what district courts within States already included in circuits, had circuit court powers. It ordained for such districts *circuit courts*, by including them, with a description which only related to State boundaries, within the established circuits; and then to prevent a possible failure of its purpose, Congress provided further, that any districts which had *never before* been included in any circuit should also have circuit courts, to be held at the times and places fixed by law for holding the district courts. This broad and far reaching legislation is a marked feature of wisdom in the policy of

the Government. It is doubtful if this law does not repeal the circuit court powers of every district court in the Union. We venture to assert that such is its necessary effect.

Since this sweeping reorganization of the circuit court system, the right of a person to be *sued* only in the district where he resides, or may be found, means what it did in the act of 24th September, 1789, viz: if sued in the circuit court, he shall not be sued in a circuit court district in which he does not reside, &c.; if sued in a district court, he shall not be sued in a district court district in which he does not reside. It certainly is not now the law that a circuit court must be held in each district court district in the United States.

In the act of March 3, 1873, Congress followed this policy still further, as it relates to Alabama. It designated the circuit court at Mobile as the circuit court for *the district of Alabama*. This was not a novel title. In substance it existed in 1820. Then it comprehended the entire State. Now it comprehends no less. This circuit court, as we have seen, has exercised part of its jurisdiction throughout these limits since 1837. Now it has the same territorial limits, but there is added to its authority within those limits, the full powers of a circuit court.

The circuit court of the United States in and for the district of Alabama, under its original baptismal name, now, by act of Congress, enters upon the full inheritance of its rights and powers in Alabama.

A further and conclusive proof of this construction of the law is found in the provision which transfers all pending causes, and records, and executions, &c., &c., into the circuit court for the district of Alabama, at Mobile. It is wholly incompatible with the idea of a circuit court with powers *limited to the southern district of Alabama*, that all pending causes in the district courts of the northern and middle districts should be transferred to the southern district, there to be tried and finally disposed of. What is to be done in such

cases, if the court cannot issue subpœnas, make orders for attachment, and other process incidental to the trial of causes, and when judgments are rendered cannot enforce them by final process, or by rules or decrees touching the defendants, and imposing on them the duties of personal obedience.

We respectfully submit that there is nothing in any statute of the United States that excludes *the jurisdiction* of the circuit courts from any part of the State of Alabama. Possibly there are persons who, by reason of their places of residence, are not liable to be sued in the southern district of Alabama. If so, this only qualifies, but does not exclude the jurisdiction of the circuit courts from two of the districts.

It ought to be a very clear case that would justify the conclusion that Congress intended to exclude the jurisdiction of the circuit courts from any part of an organized circuit. We respectfully submit that the conviction of his honor Judge Woods, that Congress did not intend the result, which he finds it has accomplished, (of excluding two-thirds of Alabama from all the rights and remedies incident to the judicial powers of the Federal Government, in any and every court,) is a sound conclusion of law deduced from undeniable premise. The actual purpose of Congress is beyond conjecture; it is very clear, and we think it is very clearly expressed.

Statutes intended to promote the general welfare are construed so as to advance, rather than obstruct, their obvious purposes.

JOHN T. MORGAN,
Attorney for Petitioner.